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No. 182

Supreme Court of the United States

OCTOBER TERM, 1959

PATRICIA I. BIRNEL, *Appellant*,

vs.

THE TOWN OF FIRCREST, *Appellee*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

STATEMENT AS TO JURISDICTION

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THE TOWN OF FIRCREST,	*Appellee.*	

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

STATEMENT AS TO JURISDICTION

Appellant Patricia I. Birnel submits herewith her statement particularly disclosing the basis upon which this court has jurisdiction on appeal to review the judgment of the Supreme Court of the State of Washington in cause No. 34857 affirming a judgment of the Superior Court of the State of Washington for Pierce County.

THE OPINION BELOW

The opinion of the Supreme Court of the State of Washington, the court affirming by a vote of six (6) to three (3), is reported in 153 Wash. Dec. 627. A copy of the opinions is attached hereto as Appendix A.

JURISDICTION

This action is a suit to enjoin the enforcement of Ordinance No. 323 of the town of Fircrest, which or-

dinance provides that a source of fluoridation approved by the State Department of Health be added to the water supply of the town of Fircrest under the rules and regulations of the State Board of Health, such addition to be administered in a manner approved by the State Department of Health.

2. The Supreme Court of the State of Washington handed down its opinion on February 26, 1959. Notice of appeal to this court was filed by the appellant with the clerk of the Supreme Court of the State of Washington on the 11th day of May, 1959.

3. The jurisdiction of this court upon appeal is conferred by Title 28 U.S.C.A. §1257(2), which provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: . . .
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

As shown by the cases cited, a municipal ordinance is a "statute of a state" within the meaning of the above section. *New Orleans Pub. Service v. New Orleans*, 281 U.S. 682, 74 S.Ct. 489, 74 L.Ed. 1115; *King Mfg. Co. v. Augusta*, 277 U.S. 100, 48 S.Ct. 489, 72 L.Ed. 801; *Jamison v. Texas*, 318 U.S. 413, 63 S.Ct. 669, 87 L.Ed. 869.

The appellant challenges the validity of Ordinance No. 323 of the town of Fircrest, a "statute of a state"

within the meaning of that provision, on the ground that, as applied to this appellant, it is repugnant to the Constitution of the United States and the decision of the highest court of the state, sitting en banc, was in favor of its validity.

4. Cases believed to sustain the jurisdiction of this court on appeal include:

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628;

Myers v. Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042;

Jacobson v. Massachusetts, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643;

Skinner v. Oklahoma, 316 U.S. 535, 625 S.Ct. 1110, 86 L.Ed. 1655;

Frank v. Maryland, 27 L.W. 4304

5. Ordinance No. 323 of the town of Firerest, the "statute" involved within the meaning of Title 28 U.S.C.A. §1257(2), is not officially reported and reads as follows:

"An Ordinance Providing for the Fluoridation of the Water Supply of the Town of Firerest, Setting Regulations Therefor.

"BE IT ORDAINED by the Council of the Town of Firerest that a source of fluoridation approved by the State Department of Health be added to the water supply of the Town of Firerest under the rules and regulations of the State Board of Health, such addition to be administered in a manner approved by the State Department of Health." (Tr. 1-2).

QUESTION PRESENTED

The question presented by this appeal is as follows: Does Ordinance No. 323 of the town of Firerest providing that a source of fluoridation approved by the State Department of Health be added to the water supply of the town of Firerest under the rules and regulations of the State Board of Health, such addition to be administered in a manner approved by the State Department of Health, deprive the appellant of her liberty without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States in that the said ordinance, if enforced, would compel the appellant and her children to consume against her will and judgment a substance, namely, fluoride, designed to affect their bodies, which substance has been prescribed by the Town Council of the town of Firerest, and which substance administered in the manner provided in said ordinance habitually causes a pathological condition, commonly known as mottled enamel, in the enamel of the teeth of some of the persons consuming it, and the intended benefits of which substance may be obtained, by those desiring the alleged benefits, more economically and efficiently by means other than the public water supply?

STATEMENT OF THE CASE

The appellant is a citizen and taxpayer residing in and paying taxes to the appellee, a municipal corporation, and is the mother of two minor children who were seven and three years of age at the time the amended complaint was verified in June, 1958.

On July 23rd, 1957 the Town Council of the appellee enacted the above-quoted Ordinance No. 323 entitled, "An Ordinance Providing for the Fluoridation of the Water Supply of the Town of Firerest, Setting Regulations Therefor." The appellant sued to enjoin the enforcement of Ordinance No. 323 on sole ground that the said ordinance deprived the appellant of her liberty without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States. In her amended complaint the appellant alleged that on March 25th, 1958 the Town Council of the appellee had awarded contracts for two units of fluoridation equipment and a tester, and that, acting through its mayor and other officers, agents and employees, appellee unless restrained and enjoined, would enforce the said ordinance and add a source of fluoridation to the water supply of the appellee.

The amended complaint further alleged that the appellant was dependent upon the water supply of the appellee for water for herself and her children to drink, and for all household and domestic purposes, and that she has no other water supply available.

She alleged that the purpose of the appellee in proposing to add fluoride to the water supply of the appellee, is not thereby to render the water supplied pure, wholesome and fit for human consumption, but is solely to affect the bodies of children who will consume the water to which the fluoride will have been added in the hope of rendering their teeth less susceptible to caries and that dental caries is not a communicable disease.

The amended complaint further alleged that the rules and regulations of the State Board of Health approving the addition of fluoride to public water supplies so as to effect a final minimum concentration of fluoride [ionized fluorine] in the water supply of .7 parts per million parts of water and a maximum concentration of 1.5 parts per million parts of water.

The appellant alleged that the ingesting of ionized fluorine by drinking water containing fluoride in the proportion approved by the State Board of Health, causes a pathological condition in the enamel of the teeth of children consuming such water, which pathological condition is commonly known as mottled enamel and that such pathological condition habitually afflicts the enamel structure of the teeth of some of the children consuming water having a fluoride concentration within the approved range and that the appellant feared that her two minor children might be among those so afflicted. She further alleged that what other effects the ingesting of fluoride by means of drinking water containing ionized fluorine in the approved proportion may have on the human body are incompletely known, and that she feared lest she and her children sustain some other effect in or upon their bodies adverse to their health, or objectionable to them, from drinking water containing fluoride as provided by Ordinance No. 323.

The appellant further alleged that fluoride might be administered in carefully controlled amounts economically, and more safely and reliably to persons desiring it through bottled water containing fluorine in the pro-

scribed amounts, in tablet form and in many other ways, any one of which methods would permit control of dosage for each individual and would be safer and more reliable than adding fluorides to the public water supply (Complaint, Tr. 1-5).

The appellee had filed a demurrer to the appellant's complaint (Tr. 8), which by stipulation was treated as a demurrer to the appellant's amended complaint (Tr. 15). The demurrer admitted for the purposes of this cause all of the allegations of the appellant's amended complaint.

After a hearing the trial court entered an order sustaining the demurrer to the amended complaint on the authority of *Kaul v. Chehalis*, 45 Wn.(2d) 616, 277 P. (2d) 352 (Tr. 12). The appellant declined to plead further, and judgment was entered in favor of the appellee on June 23rd, 1958 (Tr. 9), from which appeal was taken to the Supreme Court of the State of Washington (Tr. 10), resulting in a judgment affirming the lower court on the authority of the same decision (Tr. 19).

The Federal Questions Are Substantial

For the better part of a decade heated public controversy has persisted over the question of whether or not fluoride should be added to public water supplies for the purpose of reducing the incidence of dental caries among young children. The policy of so doing has been repeatedly submitted to the electorate of American municipalities, and the compatibility of statutes or or-

ordinances with state and federal constitutions has been frequently challenged.

In 1954, this court denied certiorari in one case, *De Argyan v. Butler*, 119 Cal. App. 674, 260 P.(2d) 98 (No. 651, cert. den.) 347 U.S. 1012, and dismissed an appeal in another, *Chapman v. Shreveport*, 225 La. 859, 74 So.(2d) 142, (No. 407, app. dis.) 348 U.S. 892, involving the general question of the authority of municipalities to fluoridate their public water supplies. Again, in 1956 this court dismissed an appeal in *Kraus v. City of Cleveland*, 163 Ohio St. 559, 127 N.E.(2d) 609, 351 U.S. 935, 76 S.Ct. 833, 100 L.Ed. 1463.

This court has many times held that the denial of a writ of certiorari imports no expression of opinion upon the merits of the case. *Atlantic Coastline R. Co. v. Powell*, 283 U.S. 398, 51 S.Ct. 498, 75 L.Ed. 1142.

The California, Louisiana and Ohio courts rested their decisions in the two above cited cases and this court dismissed the appeals in the *Chapman* and *Kraus* cases on the authority of *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S.Ct. 235, 49 L.Ed. 643. Neither the *De Argyan*, *Chapman* or *Jacobson* cases, all decided by sharply divided courts, nor the *Kraus* case can be deemed controlling in the instant case even if the *De Argyan*, *Chapman* and *Kraus* cases cases be deemed, *arguendo*, rightly decided.

The instant case comes before this court on demurrer. The complaint, the allegations of which are admitted by the demurrer, alleges the following facts: (1) The purpose of the ordinance authorizing fluoridation is not for

the purpose of providing pure water, but for the purpose of affecting the bodies of those drinking the water; (2) if fluoride is added to the water in the proportion authorized by the regulations of the State Department of Health some individuals will, as a result thereof, develop a pathological condition in the enamel of their teeth known as mottled enamel, or fluorosis; (3) dental caries is not a communicable disease; (4) persons desiring to have their teeth or their systems treated with fluoride for the purpose of reducing the incidence of dental caries in themselves, or who desire to have their children so treated to reduce the incidence of dental caries in their children's teeth, may do so simply, safely and economically on an individual basis by having the fluoride administered topically or in tablet form or in other measured doses on the prescription of their individual physicians or dentists.

The important fact that it is not necessary that fluoride be added to the public water supply system or to drinking water at all in order to make it economically available to those desiring such medication was not made to appear in the *De Aryan*, *Chapman* or *Kraus* cases, and that fact in itself renders the question raised by this complaint under the Fourteenth Amendment of the Constitution of the United States important and substantial. The admission of the fact that there are other economical, simple and safe methods of administering fluoride available to the individual necessarily means that the Town Council by Ordinance No. 123 has passed the bounds of what may be reasonably considered "necessary" for the protection of the public

health, welfare and morals, and has therefore transcended the bounds of the police power. *This we feel obviously raises a question of substance.*

The *Chapman* and *Kraus* cases, *supra*, are not in point here (a) because the availability of other, voluntary means of accomplishing the desired result was not made to appear, and (b) those cases were expressly distinguished by the Supreme Court of Indiana in *Teeter v. La Porte*, 236 Ind. 146, 139 N.E.(2d) 158, and implicitly by the Supreme Court of Canada in *Municipality of Metropolitan Toronto v. Village of Forest Hill* (1957) 9 D.L.R.(2d) 113, *infra*.

Heretofore, the exercise of the police power has been limited to the purpose of protecting members of the community from one another, from the spread of *communicable* diseases, *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643.

In the instant case the Town Council seeks to protect the inhabitants from themselves, decide what is good for them and compel them to do what the Town Council believes will be good for them even though the inhabitants can act in this instance more safely and effectively for themselves.

Freund, in his work on Police Power, § 143, says:

> "The questions which present themselves in the examination of a safety or health measure are: does a danger exist? is it of sufficient magnitude? does it concern the public? does the proposed measure tend to remove it? is the restraint requirement in proportion to the danger? *it is* [*sic*] *possible to secure the object sought without impairing* [illegible]

sential rights and principles? does the choice of a particular measure show that some other interest than safety or health was the actual motive of the legislature?" (Emphasis supplied).

If the police power is extended this far, then it is virtually unlimited. It is, of course, obvious that unlimited police power equals the police state.

In the *Jacobson* case, *supra*, this court upheld a compulsory vaccination statute against the contention that it constituted an invasion of liberty, justifying its decision in the light of a smallpox epidemic in Cambridge, Massachusetts. In upholding this legislation as constitutional, the court, speaking through Mr. Justice Harlan, recognized that the measure involved an infringement of individual liberty, an infringement which was justified only on the ground that the individual, if permitted to exercise his liberty not to be vaccinated would constitute a menace to the health and welfare of society as a whole. The court said:

"Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others. . . .

"*Upon the principle of self-defense of paramount necessity a community has the right to protect itself against an epidemic or disease which threatens the safety of its members.* . . .

"*There is, of course, a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution, to in-*

terfere with the exercise of that will. But it is equally true that in every well-ordered society, charged with the duty of conserving the safety of its members, the rights of the individual in respect to his liberty may at times, under the pressure of great dangers, be subjected to such restraint to be enforced by reasonable regulations as the *safety* of the *general public* may demand." (Emphasis supplied) 197 U.S. 11, 26, 27, 29.

Note the emphasis on the "safety" of "others."

Mr. Justice Harlan speaks of the principle of self-defense of society. The principle upon which the court upholds compulsory the vaccination law has two complementary theories as its basis: One, the principle that within the framework of a democratic society, individual liberty can exist only to the extent that it does not interfere with the rights and health and safety of the other members of the society; two, the principle that every society may legislate to protect its very existence against destruction by individual members of society. These principles directly relate to the taking of compulsory measures to isolate, detect or prevent cases of communicable and transmittable diseases which one member of society may, in some way or other, pass on to other members of society.

The care and treatment of non-communicable diseases falls within that "sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government." *Jacobson v. Massachusetts*, 197 U.S. 11, 29, 25 S.Ct. 358, 41 L.Ed. 643.

It is one thing for public health services to determine

that a physically healthy society is a strong and desirable society and to attempt to convince the public of the validity of certain health measures by means of open and frank persuasion in a democratic manner, but it is quite another thing for any group, no matter how learned, to compel individuals to be "healthy" in cases where the individual's health or ill-health cannot be transmitted to anyone else, and in addition to tell them, as well, just how to be "healthy," even though the method chosen may conflict with the individual's own judgment and that of his doctors. Yet that is exactly what Ordinance No. 323 is designed to accomplish.

Courts have frequently talked of principles in connection with cases upholding health regulations, and well they should, provided, that these principles are not tortured beyond recognition by every new development.

In the *Jacobson* case, Mr. Justice Harlan spoke of "the safety of others" and of the "principle" of self-defense and its corollary, the right of the state to restrict individual liberty so as to prevent some individuals from harming other members of society.

Resting squarely upon the principles of the *Jacobson* case is the case sustaining compulsorly sterilization of a feebleminded woman. Mr. Justice Holmes stated the basis of the court's decision as follows:

> "The principle that sustains compulsory vaccination is broad enough to cover cutting the fallopian tubes." *Buck v. Bell*, 274 U.S. 200, 47 S.Ct. 584, 71 L.Ed. 1000.

Feeblemindedness is a well-known disease which may be transmitted by heredity, and the principle that so-

ciety may act to prevent its individual members from spreading their diseases or defects to other members of society is the basis for Mr. Justice Holmes decision. The legislature had not legislated to protect the health of Carrie Buck, but had legislated only to prevent the "spread of the disease" and, therefore, the court correctly ruled that society could act "in order to prevent our being swamped by incompetence" (p. 207).

The application of this principle to laws providing for sterilization was reiterated in the concurring opinion of Mr. Chief Justice Stone in *Skinner v. Oklahoma*, 316 U.S. 535, 625 S.Ct. 1110, 86 L.Ed. 1655.

Citing *Buck v. Bell, supra*, the Chief Justice said:

> "Undoubtedly a state may, after appropriate inquiry, constitutionally interfere with the personal liberty of the individual to prevent the transmission by inheritance of his socially injurious tendencies." *Skinner v. Oklahoma*, 316 U.S. 535, 544.

If there was any doubt left by the language of Mr. Justice Holmes as to the principle which allows the state to pass sterilization laws in certain cases, that doubt is resolved by the language in the *Skinner* case.

The principle of the *Jacobson* case, *supra*, reaffirmed in the case of *Buck v. Bell, supra*, is that society may protect itself and all its members by enacting measures designed to prevent individuals from transmitting defects or diseases to other members of society. This principle supports cases upholding quarantine laws, cases allowing for the control or prevention of venereal disease, and, in fact, all cases which uphold laws concerned with the control and prevention of contagions or con-

municable diseases or defects. See *State ex rel. McBride v. Superior Court*, 103 Wash. 409, 174 Pac. 973 (venereal disease case). It is a principle which has no relevance to the issues involved in fluoridation legislation."

The theory, and the only theory which could support Ordinance No. 323 is that society may enact "health measures" requiring people to submit to treatments which the legislating body deems to be good for them.

On identical sets of facts the Supreme Court of Canada and the Supreme Court of Indiana have held legislation providing for the addition of fluoride to public water systems beyond the power of the municipality enacting such legislation.

In *Municipality of Metropolitan Toronto v. Village of Forest Hill* (1957) 9 D.L.R.(2d) 113, affirming (1955) 5 D.L.R.(2d) 621, the Supreme Court of Canada held a by-law authorizing the Municipality of Metropolitan Toronto to fluoridate its public water supply to be beyond its power under a statute authorizing it to regulate the time, manner, extent and nature of the supply of water from its water works system, and every other matter or thing related to or connected therewith which it may be necessary and proper to regulate in order to secure to the inhabitants of the Metropolitan Area a continued and abundant supply of pure and wholesome water. Mr. Justice Rand stated:

> "But it is not to promote the ordinary use of water as a physical requisite for the body that fluoridation is proposed. That process has a distinct and different purpose; it is not a means to an end

of wholesome water for water's function but to an end of a special health purpose for which a water supply is made use of as a means.

"The method proposed does not appear to be the only feasible mode of making available to the public what is considered by the municipality to be a desired health ministration. *Fluoridation apparently can be provided otherwise than by making it general in the water supply.* If that is so, there is here neither that accepted desirability for its use nor an unobjectionable manner of supplying it which in other situations might be influential considerations in the determination of the question raised." p. 118. (Emphasis supplied.)

Mr. Justice Cartwright observed:

"If, on the evidence in the record, it could properly be regarded as action by the council to provide a supply of pure and wholesome water or to render more pure and wholesome a supply of water already possessing those characteristics I would hold it to be valid. But in my opinion, it cannot be so regarded. Its purpose and effect are to cause the inhabitants of the metropolitan area, whether or not they wish to do so, to ingest daily small quantities of fluoride, in the expectation which appears to be supported by the evidence that this will render great numbers of them less susceptible to tooth decay. The water supply is made use of as a convenient means of effecting this purpose. In pith and substance the by-law relates not to the provision of a water supply but to the compulsory preventive medication of the inhabitants of the area. In my opinion the words of the statutory provisions on which the appellant relies do not confer upon the council the power to make by-laws in relation to matters of this sort." pp. 123-124.

In *Teeter v. Municipal City of LaPorte*, 236 Ind. 146, 139 N.E.(2d) 158, the Supreme Court of Indiana reversed the trial court which had sustained a demurrer to a complaint alleging, in part:

> "27. That the toxic qualities of fluorines affect the health and physical condition of different persons in various manners, some being peculiarly allergic to same, and to require the entire population of said city to ingest them, particularly when artificially and mechanically added, would have a cululative [cumulative] toxic effect, particularly upon the aged, the ill, and those suffering from chronic physical ailments, particularly cancer." p. 160,

holding that it could not state as a matter of law that the above quoted allegations were untrue. The Supreme Court of Indiana distinguished the case before it from previous cases decided both by this court and by state courts sustaining the fluoridation of water supplies, and said:

> "The second ground of the demurrer was for failure to state facts sufficient to constitute a cause of action We do not deem it necessary to consider all the reasons and arguments cited in the memorandum to the demurrer in support of this ground. There is nothing in the memorandum whereby we would be authorized to hold that rhetorical paragraph 27 of the amended complaint is untrue as a matter of law. We do judicially know many cases have decided that fluoridation of public water supply is a reasonable exercise of the police power. *Baer v. City of Bend*, 1956, 206 Or. 221, 292 P.2d 134; *Kraus v. City of Cleveland*, 1955, 163 Ohio St. 559, 127 N.E.2d 609, appeal dismissed 1956, 351

U.S. 935, 76 S.Ct. 833, 100 L.Ed. 1463; *Froncek v. City of Milwaukee*, 1955, 269 Wis. 276, 69 N.W.2d 242; *Dowell v. City of Tulsa*, Okl. 1954, 273 P.2d 859, certiorari denied 1955, 348 U.S. 912, 75 S.Ct. 292, 99 L.Ed. 715; *Kaul v. City of Chehalis*, 1954, 45 Wn.2d 616, 277 P.2d 352; *Chapman v. City of Shreveport*, 1954, 225 La. 859, 74 So.2d 142, appeal dismissed 1954, 348 U.S. 892, 75 S.Ct. 216, 99 L.Ed. 701; *De Aryan v. Butler*, 1953, 119 Cal. App.2d 674, 260 P.2d 98, certiorari denied 1954, 347 U.S. 1012, 74 S.Ct. 863, 98 L.Ed. 1135. Only one of these cases was an appeal from a judgment on a demurrer, and there were admissions made by counsel in an oral argument and it does not appear the complaint alleged fluoridation had toxic effects." page 160.

Dissenting in *Kaul v. Chehalis* (1954) 45 Wn.(2d) 616, 277 P.(2d) 352, Judge Frederick G. Hamley, now Judge of the United States Court of Appeals for the Ninth Circuit, warned:

> "The principle being established by the majority opinion, even more than the specific deprivation of personal liberty here accomplished, warrants deep concern. The case before us deals with what some will regard as a relatively minor aspect of dental health. But the principle announced is not so limited. It would be equally applicable if fluoridation (or iodination) was being relied upon to counteract goiter or any other noncontagious bodily malady. What future proposals may be made to treat noncontagious diseases by adding ingredients to our water supply, or food, or air, only time will tell. When that day arrives, those who treasure their personal liberty will look in vain for a constitutional safeguard. The answer will be: 'You gave the constitution away in the *Kaul case*.' " p. 640.

In a speech reported in the Paterson Evening News of Friday, November 6, 1953, Leonard A. Scheele, Surgeon General of the United States, told a conference of state and territorial health and hospital authorities:

> "The nation-wide research effort . . . will produce sooner than we think findings capable of turning public health work upside down. . . .
>
> "Medical research is on the verge of remarkable advances in our knowledge of chronic diseases, viral diseases and mental diseases, as well as in our basic understanding of the human organism and its functioning. . . . "

The article goes on to report:

> "Dr. Scheele, in discussing mass application methods for preventing non-infectious diseases, said a case in point was fluoridation of public water supplies to reduce tooth decay.
>
> "Such a community-wide attack on 'far more serious diseases than dental decay' probably will be forthcoming after laboratory tests have paved the way, he predicted."

If the courts have any doubt as to the implications of the fluoridation cases, certainly the health authorities do not.

In an Editorial in Public Health Reports, Vol. 66, No. 5, February 2, 1951, p. 129, Joseph W. Mountain, Assistant Surgeon General and Associate Chief, Bureau of Statistics, Public Health Service, stated the aims of the public health program:

> "In recent years we have been witnessing a steady broadening of the horizons of public health.
>
> . . . .
>
> "The goal for each person suffering from ill

> health or disability of any kind, for example, is a multiple one. The person *must* be found, he *must* be given the best medical treatment that can be provided, he *must* be physically and mentally rehabilitated, and he *must* retake his place in society, insofar as possible, by making full use of all his resources." (Emphasis supplied). p. 129.

In California's Health, official publication of the California State Department of Public Health, Volume 12, Number 3, dated August 1, 1954, Wilson G. Smile, M.D., Professor of Preventive Medicine and Public Health, Cornell University Medical School, outlined the aims of the new health program:

> "1. The community (the state) will continue to assume responsibility for the health protection of all the people, all ages, all classes, all groups in the community." p. 18.

The comprehensive program of compulsory community-wide medical care being formulated and advocated by "public health authorities" includes the treatment of mental illnesses.

The basic question involved is the dignity and individual liberty of the person, a liberty which should not be restricted where no harm to others can result from its exercise.

A diversity of opinion is essential to free political institutions and scientific progress. A vital diversity of opinion requires not only the opportunity to hold and express beliefs, but the opportunity to practice and to adhere to such beliefs wherever it is possible to do so without harming other members of society.

Medicine, in the field of noncommunicable and non-

transmittible diseases, is one field wherein it is possible for the public to enjoy the benefits of diverse medical opinion without one member of society threatening the health of other members.

The value of such diversity has been recognized in the state of Washington by statutes authorizing the licensing to practice healing arts of adherents of the following schools of healing:

Chiropody RCW 18.22;
Chiropractic RCW 18.25;
Dentistry RCW 18.29;
Drugless healing RCW 18.36;
Optometry RCW 18.53;
Osteopathy RCW 18.57;
Physicians and surgeons RCW 18.71;
Psychologists RCW 18.83.

Which of the above schools of healing a citizen elects to entrust with the care and treatment of his body and mind, or, indeed, whether he will so entrust any one of them or more, is a decision which the constitution and good sense leave solely to the individual concerned. *The enforcement of Ordinance No. 323 will deny to residents of the Town of Fircrest any liberty of choice in the manner of the care of their and their children's teeth.*

Medical science, for all its wonders, and spectacular achievements, has often exhibited a tendency to rush ahead too quickly and to adopt and put into practice theories which are later discarded because their harmful effects, tardily discovered, outweigh their apparent beneficial ones.

Fluoridation is by no means the first attempt to inject medicine into public water supplies.

As early as 1923 two American cities, Rochester, New York, and Anaconda, Montana, were putting iodine into the water to prevent endemic goiter.

In Volume 42 of the Public Health Reports, No. 20, p. 1355, May 20, 1927, Robert Olesen, surgeon, United States Public Health Service, had this to say about the iodization of public water supplies:

> "Unfortunately, the consumption of water varies within a wide range, some individuals drinking considerable water, while others use relatively small quantities. However, the amount of iodine present in properly treated water is so minute that no harm could possibly result from excessive consumption of water. On the other hand, it is conceivable that these same minute doses of iodine will prevent simple enlargement of the thyroid gland. At the same time, it must be conceded that the iodine obtained from treated water is likely to be uncertain in quantity. The objections raised against the use of iodized drinking water as a means of preventing endemic goiter have been numerous. The strongest disapproval has come from the group which discredits all attempts of scientific medicine to minimize the prevalence of disease. Iodization of drinking water is termed by them a 'doping' or poisoning process. In view of the minute quantities of iodine used and the scientific premise on which the procedure is based, the objections of an organized minority may be somewhat discounted. There are, however, certain apparently legitimate objections which deserve consideration. Among these may be mentioned the possibility of inaugurating toxicity in apparently benign goiters, excessive cost, waste, offensive taste,

undesirable chemical combinations and the like." pp. 1359-1360.

Dr. Olesen thereupon proceeds to discuss and analyze these objections. His conclusion is that the iodization of public water supplies, in its present state of development, cannot be recommended for widespread adoption, adding that "the measure appears to be theoretically sound and promising as a means of reducing goiter incidence when correctly used." However, at the time this report was published, the two cities referred to above had adopted and were practicing iodization, while other cities which had put iodine in their water, had speedily abandoned the process because of numerous objections from the residents.

In other words, despite the uncertainty and disagreement among medical authorities, two cities in the United States, acting under the theory now sought to be established by the fluoridation cases, compelled their inhabitants to subject themselves to taking iodine through the water supply, a method of providing the body with iodine which has since been discredited.

Iodine may now be obtained through the purchase of iodized salt. But it is also possible to purchase non-iodized salt. The individual may choose how he wishes to protect his health. He may follow the advice of his own personal physician in respect to iodine. But in respect to fluoride, the citizen is to be denied this choice.

As in the case of administering iodine to prevent goiter, there are other optional, safe alternative methods of administering fluoride, and the same choice should

be afforded each person, since none can be injured by another's decision not to use it.

The dangers of such experimentation, which are inevitable once the principle of compulsory treatment for non-contagious disease is established, are great. The public necessity for such measures has never been demonstrated.

The importance of ascertaining the constitutional limits within which legislatures may exercise the police power in the name of public health has been well illustrated by the decision of this court on May 4th, 1959 in *Frank v. Maryland*, 27 L.W. 4304, where this court divided five to four in sustaining the search by the Commissioner of Health of a private dwelling without any warrant although no particular reason was alleged why a warrant could not have been procured.

A long history of human experience has shown that what the majority or the "weight of authority" holds to be truth today is not necessarily truth tomorrow. Every application of medicine or chemicals to the human body is, in a sense, an "experiment."

> "The triumphs of science are due to the substitution of observation and inference for authority. *Every attempt to revive authority in intellectual matters is a retrograde step*, and it is part of the scientific attitude that the pronouncements of science do not claim to be certain, but only to be the most probable on present evidence." Bertrand Russell, The Impact of Science on Society, p. 89 (Emphasis added).

Yet in the face of this fallibility, uncertainty, and the constant change in medical opinion, courts upholding

fluoridation have allowed legislatures to compel individuals to submit to the current weight of medical opinion and to subject themselves to what is currently accepted as desirable and beneficial treatment. Such courts have chosen to answer Alexander Pope's rhetorical question, "Who shall decide when doctors disagree?" Moral Essays, Epistle III, line 1. And the answer they give is, "The legislature shall decide," adding parenthetically and without any possible significance, "within reason, of course." The dangers in allowing such a compulsion where it is not necessary to protect society from the spread of contagious diseases are obvious.

Concluding his dissenting opinion in *Kaul v. Chehalis*, quoted in part above, Judge Hamley emphasized the ultimate question here for review as follows:

> "The question which I asked in my dissent in *State ex rel. Holcomb v. Armstrong*, 39 Wn.(2d) 860, 873, 239 P.(2d) 545, now becomes more urgent than ever:
>
> "'Can we, . . . withstand the insidious erosion [of our basic liberties] produced by a multiplicity of little instances where, as here, a guaranteed right is set aside because it interferes with what is said to be good for us?"

Respectfully submitted,

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July 6, 1959

APPENDIX A

Opinion of the Supreme Court of Washington in the Instant Case and Judgment Appealed From

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

PATRICIA I. BIRNEL, *Appellant*, vs. THE TOWN OF FIRCREST, *Respondent*.	No. 34857 EN BANC Filed February 26th, 1959

PER CURIAM—Plaintiff commenced this action to have ordinance No. 323 of the town of Fircrest declared unconstitutional and to enjoin the town from adding to the city water supply

> ". . . a source of fluoridation approved by the State Department of Health . . . under the rules and regulations of the State Board of Health, such addition to be administered in a manner approved by the State Department of Health."

A demurrer was sustained to plaintiff's amended complaint; she elected not to plead further and now appeals from a judgment dismissing her action with prejudice.

The judgment is affirmed on the authority of *Kaul v. Chehalis*, 45 Wn.(2d) 616, 277 P.(2d) 352 (1954).

It is so ordered.

We dissent for all of the reasons urged in the three dissents in *Kaul v. Chehalis* (1954), 45 Wn.(2d) 616, 277 P.(2d) 352.

HILL, J.
DONWORTH, J.
FOSTER, J.

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FILED
JUL 29 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 182

PATRICIA I. BIRNEL,
Appellant,

vs.

THE TOWN OF FIRCREST,
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF WASHINGTON

MOTION TO DISMISS APPEAL AND BRIEF IN SUPPORT THEREOF

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS APPEAL

Comes now the Appellee herein and moves the Court for an Order dismissing the Appeal filed by Appellant, for the reason that it does not present a substantial Federal question; that no debatable constitutional question is involved in said cause; and further, that no question arising under the Constitution of the United States is involved in said cause.

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BRIEF IN SUPPORT OF MOTION TO DISMISS

STATEMENT OF THE CASE

The facts presented in Appellant's Brief under "Question Presented" and "Statement of the Case" are, for the purpose of this Motion, admitted to be substantially correct.

ARGUMENT

Appellant's Brief urges that the only Constitutional question presented in this Appeal is a denial to Appellant of her liberty without due process of law, in violation of the 14th Amendment of the Constitution of the United States. This question has been before the Court in three prior cases.

DeAryan v. Butler, 119 Cal. App. 674, 260 P.(2d) 98 (No. 651, cert. den.) 347 U.S. 1012, certiorari denied;

Chapman v. Shreveport, 225 La. 859, 74 S.(2d) 142, (No. 407, app. dis.) 348 U.S. 892, Appeal dismissed.

Kraus v. City of Cleveland, 163 Ohio St. 559, 127 N.E.(2d) 609, 351 U.S. 935, 76 S. Ct. 833, 100 L. Ed. 1463, Appeal dismissed.

Appellant's argument for the most part is an attempt to distinguish her case from the above cited cases and various points are urged as reasons for doing so. The Supreme Court of the State of Washington has also decided this question adversely to the Appellant in *Kaul v. Chehalis*, 45 Wn.(2d) 616, 277 P.(2d) 352.

Appellant states, at page 9 of her Brief, that "it is not necessary that fluoride be added to the public water supply system or to drinking water at all in order to make it economically available to those desiring such medication", and since such an allegation was not present in the three previously cited cases, this case does, for that reason, raise a question under the 14th Amendment of the Constitution of the United States, which is both important and substantial. Appellee, in answer to that contention, wishes to point out that that precise question was involved in the Kraus, Chapman and DeAryan cases *supra*. The Supreme Court of Ohio in the Kraus case *supra* stated: "It is argued that the same result might be accomplished by private dental care, and since there is an alternative to public regulations, police power may not be invoked. Although it is admitted that private care would be effective, the record shows that there are not sufficient private dental facilities to perform the task. Under our modern existence the law must change and expand with mechanical and scientific progress. What did not concern public health yesterday, because of an inability of science to cope with the problem at hand,

may very well today become a matter of public health due to scientific achievement and progress. The use of fluoridation to prevent dental caries is an excellent example of this proposition. Science has discovered a method whereby dental caries may be diminished. The prevalence and danger of such caries are well known and the only practicable application of such scientific knowledge is by treating drinking water with fluoride. Thus the problem of dental caries has of necessity become one of public health."

The Supreme Court of Louisiana in the Chapman case *supra*, in disposing of this contention, stated as follows: "The Appellee insists and the District Judge concluded that fluoridation of the water to prevent tooth decay is not a matter of public health, but a matter of private health and hygiene. The evidence in this record refutes overwhelmingly this conclusion. Dental caries is one of the most serious health problems in the City of Shreveport and in the nation as well. The fact that it is not a communicable disease and one that can cause an epidemic does not detract from its seriousness as affecting the health and well-being of the community. The plan for fluoridation, therefore, bears a reasonable relation to the general welfare and general health of the community and is a valid exercise of the police power conferred by Section 2.01 of the Charter as it is not arbitrary or unreasonable." The Court found further, in reviewing the judgment of the District Court, that the regulation was not arbitrary or unreasonable.

It will be noted then, from the foregoing, that the issue of availability of other voluntary means of accomplishing the desired result was discussed in the Kraus and Chapman cases *supra*. Further reference should be made to Appellant's Brief, page 10, in which it is stated

that the Supreme Court of Indiana in the case of *Teeter v. La Porte;* 236 Ind. 146, 139 N.E.(2d) 158, distinguished the Chapman and Kraus cases *supra.* A review of the Indiana case will show that it was a case of first impression in the State of Indiana, and that the Supreme Court desired, rather than that the matter be disposed of on the basis of a demurrer, that evidence of the allegation in opposition to fluoridation be received by the Trial Court and was, for that reason, returned for trial. The situation differed in Washington where the Supreme Court had previously ruled on all the substantial points in issue in the Kaul case, *supra.*

Appellant further states on page 10 of her Brief that "heretofore the exercise of the police power has been limited to the purpose of protecting members of the community from on another or from the spread of communicable diseases". Citing *Jacobson v. Massachusetts,* 197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643. Appellee differs.

Reference is made to the Kraus case *supra* in which the Supreme Court of Ohio stated as follows: "Clearly, neither an overriding public necessity nor emergency, nor infectious or contagious diseases are the criteria which authorize the exercise of the police power in relation to public health. That dental caries is a disease is not questioned and its prevalence is well recognized as is the fact that the health of the teeth bears a direct relationship to general physical health."

In sustaining a similar fluoridation Statute the Court in *Dowell v. City of Tulsa, Oklahoma,* 273 P.(2d) (Okla) 859 (1954), stated: "The relation of dental hygiene to the health of the body generally is now so well recognized as to warrant judicial notice. Thus, the fact that dental

caries is neither infectious nor contagious does not remove it from the authority of a municipality to attempt its control by fluoridation of the water supply."

To the same effect is the Kaul case *supra*, which quoted from the Kraus case, and to the same effect is the previously quoted provision from the decision of the Supreme Court of Louisiana as bearing not only upon the issue of communicable diseases, but private health measures as well.

Again Appellee wishes to point out that the issue of communicable disease has been before this Court on prior occasions and either certiorari has been denied or the appeals have been dismissed.

Appellant, in her Brief, page 11, quotes extensively from the Jacobson case *supra*. We agree completely with the decision and the reasoning of that case. Futhermore, Appellee wishes to point out that in the Jacobson case various offers of proof on behalf of the defendant were denied and rejected by the Trial Court, which denial was upheld on appeal by the Supreme Judicial Court of Massachusetts and later by this Court, which quoted extensively from the decision of the Massachusetts Court. What practical difference can there be under the 14th Amendment etiher that the Appellant cannot introduce testimony with respect to his allegations, or that we assume that he has, and they have been held for naught as in a demurrer? Both cases come to the same conclusion, but through different avenues. This present case and the Jacobson case have a great deal in common. Jacobson offered to prove that vaccination quite often caused serious and permanent injuries to the health of the person vaccinated; that it occasionally resulted in death; that it was impossible to tell in any particular case what the results of vaccination would be.

Appellant pleads that the ingesting of ionized fluorine by drinking water containing fluoride in the proportion approved by the State Board of Health, in addition to causing a "pathological condition" in the enamel of the teeth of children consuming such water, which condition is commonly known as mottled enamel and habitually affects the enamel structure of the teeth of "some" of the children (which condition Appellee suggests to be quite harmless), and causes "other effects" which are "incompletely known." Further the Appellant alleged that her two minor children "might be" among those afflicted by mottled enamel, and that she feared lest she and her children sustain some "other effect" in or upon their bodies adverse to their health or objectionable to them from drinking water containing fluoride, as provided by the Ordinance of the Town of Fircrest.

In disposing of the offer of proof, which is couched in language not unlike the present case, the Supreme Court of the United States, through Justice Harlan, stated: "These offers in effect invited the Court and Jury to go over the whole ground gone over by the Legislature when it enacted the Statute in question. The Legislature assumed that some children, by reason of their condition at the time, might not be fit subjects of vaccination, and it is suggested, and we will not say without reason, that such is the case with some adults. It seems to the Court that the effect would be to practically strip the Legislative Department of its function to care for the public health and the public safety when endangered by epidemics or disease."

The Chapman case *supra* states: "There is no merit in Appellee's argument that if the City Charter grants to the City Council of Shreveport authority to fluoridate its water supply, such action to that extent is a violation

of the 14th Amendment to the United States Constitution. The 14th Amendment does not deprive a State or its subdivision of the right to preserve order or to protect the health of the people under its police power and in the exercise of its power the Legislative Branch may interfere with and impair the individual liberty of the citizens in the manner and to an extent reasonably necessary for the public interest and the Courts will not interfere except where the measures invade fundamental rights or are arbitrary, oppressive or unreasonable. This is not a proper case for judicial interference". . . . At the present time fluorides are being added to the public water supplies in practically every state in the Union and in the District of Columbia. Vital statistics from communities in the United States consuming water containing one part of fluoride per million parts of water and reports from physicians in these communities have indicated uniformly and without exception, no undesirable effects on birthrate, death rate, elderly or sick individuals or any other persons. As a result of these facts and of various studies and experiments on the subject, the fluoridation of public water supplies has been approved and recommended by the United States Public Health Service, National Institution of Health, American Dental Association, American Medical Association, American Public Health Association, Association of State and Territorial Health Officers and numerous other national and state scientific organizations.

What everybody knows, the Court must know, and the Court below judicially knew that a belief opposite to the belief of the Appellant accords with the common belief and is maintained by high medical authorities. Appellee respectfully submits that this Court may take judicial notice of the fact that no harm can come to any

user of public water supplies under rules and regulations of the appropriate health departments of the State of Washington.

CONCLUSION

In conclusion, Appellee respectfully submits that the Appellant presents no question of a substantial character in conflict with prior decisions of this Court. We therefore submit that the Appeal be dismissed.

Respectfully submitted,

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CERTIFICATE

I hereby certify that 3 copies of the above and foregoing Motion and supporting Brief has been served on opposing counsel by depositing the same in a United States Post Office or Mailbox with first class postage prepaid addressed to counsel of record, Alfred J. Schweppe, Mary Ellen Krug and Frederick C. Tausend, at their address, 657 Colman Building, Seattle 4, Washington.

This ..... day of ..... , 1959.

CREIGHTON C. FLYNN,
Of Counsel for Appellee.

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No. 182

Supreme Court of the United States

OCTOBER TERM, 1959

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BRIEF IN OPPOSITION TO MOTION TO DISMISS

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ORDINANCES

Town of Fircrest Ordinance 323 9

Supreme Court of the United States

OCTOBER TERM, 1959

PATRICIA I. BIRNEL,	*Appellant,*	No. 182
vs.		
THE TOWN OF FIRCREST,	*Appellee.*	

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF IN OPPOSITION TO MOTION TO DISMISS

Appellee's motion to dismiss appears to rest on the ground that the question presented by this appeal, having been before the court in three prior cases, is not substantial. Appellee concedes that appellant's statement of the question and statement of the case are correct.

Appellant submits that the question raised by this appeal has never been presented to this court before and was not passed upon by the decisions of the state courts relied upon by appellee.

The first of the fluoridation cases was *DeAryan v. Butler* (Aug. 13, 1953) 119 Cal. App. 674, 260 P.(2d) 98 (No. 651, cert. den.), 347 U.S. 1012, 76 S.Ct. 67, 100 L.Ed. 743. This case was argued by the plaintiffs *in propria persona*. From the reported opinion of the state appellate court it does not appear that any suggestion was made that there were available, if indeed there were

at that time available, economical and safe methods of administering fluoride to persons desiring it other than by adding it to the public water supply, as has been alleged in the instant case and as is admitted for the purposes of the demurrer. Neither was it made to appear in the *DeAryan* case that a pathological condition known as mottled enamel habitually afflicts the enamel structure of the teeth of some of the children consuming water having a fluoride concentration within the approved range, as is admitted for the purposes of this litigation (Tr. 3). In the *DeAryan* case one witness testified that moderate fluorosis was a "probability." Here it is conceded as a certainty.

The next case was *Chapman v. City of Shreveport*, 225 La. 859, 74 S.(2d) 142 (No. 407, app. dis.), 348 U.S. 892, decided May 31, 1954. In that case there was only a general allegation that fluoride might cause harm to the aged and ill, and no proof was offered at the trial in support of the allegation. There was no suggestion that the benefits sought from fluoride were available through other means than adding it to the public water supply, and, of course, we do not know whether or not other means were then readily available.

On June 15, 1954, the Supreme Court of Oklahoma decided *Dowell v. City of Tulsa*, Okla., 273 P.(2d) 859. No review of the decision was sought in this court. From the opinion of the state court it does not appear that any issue of injury to persons drinking water to which fluoride had been added was raised. The issue of private

treatment was raised, although the circumstances surrounding the presentation of the issue were peculiar. At the trial the plaintiffs offered no evidence, but stipulated with the defendants as to certain facts, p. 861. The only witness used at the trial was a public health man, Dr. Paul Haney, Superintendent of Health for the City and County of Tulsa. His testimony was to the effect that treatment of drinking water by individuals without competent medical supervision would be both dangerous and impractical, p. 864, testimony which was probably accurate enough, but which is entirely irrelevant to this case, since no such unsupervised, individual fluoridation of water supplies has been suggested in this case, but it is admitted that fluoride may be administered in carefully controlled amounts, economically and more safely and reliably, to persons desiring it through bottled water containing fluorine in prescribed amounts, in tablet form and in many other ways, and that any such method which permits control of the dosage for each individual is safer and more reliable than adding fluoride to the public water supply (Tr. 3-4, 8, 15).

On December 2, 1954, the Supreme Court of Washington, dividing five to four, decided *Kaul v. Chehalis*, 45 Wn.(2d) 616, 277 P.(2d) 352. In that case neither the fact that some children are habitually afflicted with mottled enamel from consuming water containing fluoride in the approved concentration, nor the fact that there are other means of administering fluoride safely and economically was made to appear. No appeal was taken to this court.

The Supreme Court of Ohio, on June 29, 1955, decided *Kraus v. City of Cleveland*, 163 Ohio St. 559, 127 N.E. (2d) 609 (No. 693, app. dis.), 351 U.S. 935, 76 S.Ct. 833, 100 L.Ed. 1463. The Ohio court stated as quoted by appellee:

> "Although it is admitted that private care would be effective, the record shows that there are not sufficient private dental facilities to perform the task." p. 612.

No lack of sufficient facilities has been claimed in the instant case. Moreover, it appears from the opinion of the trial court in *Kraus v. City of Cleveland* (October 23, 1953), 116 N.E.(2d) 779, that the only private method brought to the attention of the court in that case was topical application of fluoride by a dentist, p. 789. In the instant case, six years later, *it is admitted that fluoride is available safely, economically and more reliably* than through addition to public water supplies, in tablet form, in bottled water and in many other ways (Tr. 3-4).

Thus this is the first case which has presented to this court the question of whether or not an ordinance authorizing the addition of flouride to a municipal water supply in the proportion of one part of fluoride per million parts of water deprives a plaintiff of her liberty without due process of law when it is admitted that:

1. the purpose is to prevent dental caries (Tr. 2);

2. dental caries is not a communicable disease (Tr. 2);

3. a pathological condition known as mottled enamel habitually afflicts the enamel structure of the teeth of

some children consuming water containing fluoride in the authorized concentration and other effects are incompletely known (Tr. 3); and

4. the intended benefits of fluoride may be obtained by those desiring them, through bottled water containing fluorine in prescribed amounts, in tablet form and in many other ways and that *such methods which permit control of dosage for each individual are safer and more reliable than adding fluorides to the public water supply* (Tr. 3-4).

The existence of a reasonable and practicable means of securing the object sought without impairing the rights and liberty of those individuals who do not choose to drink fluoridated water goes straight to the heart of the question of *reasonableness* in exercising the police power, and in this way raises a constitutional question not presented to the court in any of the cases cited in appellee's brief.

More than a year after the last of the above-cited cases had been decided, on December 26, 1956, the Supreme Court of Indiana decided *Teeter v. Municipal City of LaPorte*, 236 Ind. 146, 139 N.E.(2d) 158, which considered all of the above-discussed cases, distinguished them, and in a unanimous opinion reversed a trial court which had sustained a demurrer to a complaint which alleged that fluoride was toxic and might injure some people.

The Indiana court held that it could not hold such allegations untrue as a matter of law. On pages 9-10 of its motion to dismiss this appeal the appellee asks this.

court to "take judicial notice of the fact that no harm can come to any user of public water supplies under rules and regulations of the appropriate health departments [*sic*] of the State of Washington." To take judicial notice of any such absurdity is precisely what the Supreme Court of Indiana correctly held it could not do.

Appellee attempts to distinguish *Teeter v. Municipal City of LaPorte*, 236 Ind. 146, 139 N.E.(2d) 158, on the ground that it was a case of first impression and came before the appellate court on demurrer. All of the above-cited cases were cases of first impression, and this case is before this court on demurrer.

It was on June 26, 1957, long after the rendition of the decisions in all of the above-mentioned cases, that the Supreme Court of Canada affirmed the Ontario Court of Appeal in holding the fluoridation of its public water supply beyond the powers of the Municipality of Metropolitan Toronto in *Municipality of Metropolitan Toronto v. Village of Forest Hill*, 9 D.L.R.(2d) 113. The identical conclusion had been reached by the Appeal Division of the New Brunswick Supreme Court on December 15, 1955, in *The Queen v. Fredericton*, 2 D.L.R. (2d) 551. Although the Toronto case involved the application of a statute rather than a constitution, the bases of the decision quoted in appellant's statement as to jurisdiction on pages 15-16 are equally in point here, and are here presented for the first time. Appellee does not comment on the Canadian decision. A decision of the highest tribunal of Canada should carry great weight with this court, and, at the very least, indicates that the question, admittedly federal, is substantial.

Appellee then argues for the conclusion which is inherent in its position and in the position of all proponents of the fluoridation of public water supplies, namely, that legislative power over the health of individuals is plenary, and may be utilized, subject to no constitutional safeguard, to compel any treatment the legislature deems appropriate for any disease, contagious or non-contagious.

The conclusions the appellee draws from *Jacobson v. Massachusetts* (1905), 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643, make appellant's point admirably. Appellee argues that if the state can compel vaccination to prevent the spread of smallpox, it can compel its residents to submit to any medical (perhaps surgical?) treatment the public health departments and "high medical authorities" deem good for them, and asks this court to judicially notice that "no harm can come to any user of public water supplies under rules and regulations of the appropriate health departments . . ."

At page 7 of its brief, appellee admits that courts have summarily refused to take evidence on the question of harm in reviewing a legislative enactment purporting to benefit the "public health," even when the evidence was offered to prove that vaccination quite often caused serious and permanent injuries to the health of the person vaccinated and occasionally resulted in death. In so doing, appellee admits a well-known historical fact which has alarmed at least one distinguished expert on constitutional law.

"There is always the danger, however, that the court will take judicial notice of a fact which is

> debatable. Indeed, if the doctrine were carried to its logical conclusion, the court would seem to be warranted in ruling out all evidence which did not coincide with its own opinion. This result was actually attained in the vaccination cases. The *dicta* in these decisions go so far from the beaten path that one would be tempted to ignore them as a judicial freak, were they not the solemn declaration of two of the most respected of state courts and also the Supreme Court of the United States. . . . Both attempts to introduce evidence of a scientific nature, tending to prove that vaccination is without value and even dangerous where frustrated by the deep-seated prejudice of the court as to its value." Mott, Due Process of Law, Sec. 218 at page 555.

In short, the courts in the vaccination cases did not feel themselves competent to overrule the "medical judgment" of a small group of individuals, not especially qualified to such a judgment, but who had been elected to the state legislature. The fact that courts have approached the question of police power health regulations in this manner compels those same courts to be constantly alert for unwarranted, unwise, and unnecessary extensions of the power vested in the legislature to make such medical judgments and to compel all the citizens of the state to accept them.

It should be noticed, however, in the *Jacobson* case no one offered to prove that vaccination ***habitually*** killed any substantial number of people or even caused them serious harm.

The *Jacobson* case and all the cases following it until the fluoridation campaign have held that the state may

compel its residents to employ such means as may be available to protect one man from another, to halt or prevent epidemics, to prevent the transmission of feeble-mindedness, and other like conditions from one person to another. To extend this doctrine from communicable diseases or transmittable conditions to admittedly non-communicable diseases which affect only the individual suffering therefrom is an extension of the concept of public health into a wholly novel area.

If Ordinance No. 323 of the Town of Fircrest is a lawful exercise of the police power, then the power of the state to prescribe treatment for the private ailments of its citizens is, as appellee suggests, virtually unlimited. No such implication inheres in the *Jacobson* case which concerned one of the most highly infectious, disfiguring and fatal diseases of the human race.

In *Loan Association v. Topeka* (1874) 20 Wall. 655, 22 L.Ed. 455, this court said at pages 662-663:

> "It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of

others, whether it is not wiser that this power should be exercised by one man than by many.

"The theory of our governments, State and National, is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers.

"There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name."

Glib statements on page nine of appellee's motion about the extent of fluoridation, vital statistics, unidentified reports of physicians, and alleged endorsements are demonstrably inaccurate, wholly without support in the record and irrelevant to the issues here before the court.

Appellant believes the difference between a public epidemic of smallpox and a purely personal cavity in the tooth of an individual is sufficiently substantial to warrant consideration of the merits of this case before committing our lives and health to an official bureaucracy.

Respectfully submitted,

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MARY ELLEN KRUG
FREDRIC C. TAUSEND
Attorneys for Appellant.

657 Colman Building,
Seattle 4, Washington,
August 11, 1959.

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No. 182

In the Supreme Court of the United States

OCTOBER TERM, 1959

PATRICIA I. BIRNEL, *Appellant*,

vs.

THE TOWN OF FIRCREST, *Appellee*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITION FOR REHEARING

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In the
Supreme Court of the United States

OCTOBER TERM, 1959

PATRICIA I. BIRNEL,	*Appellant*,	No. 182
vs.		
THE TOWN OF FIRCREST,	*Appellee*.	

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITION FOR REHEARING

On October 12, 1959, this court entered an order dismissing the appeal for want of a substantial federal question.

Inasmuch as the complaint challenges Ordinance No. 323 of the Town of Fircrest on the sole ground that it deprives appellant of her liberty without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States, the question is clearly federal. In concluding that the question is not substantial, the court erred.

The question is the extent to which governmental authority may dictate and supervise the prevention and treatment of *non-communicable* diseases.

The ordinance here before the court authorizes putting fluoride ion in the public water supply in the hope of reducing the incidence of dental caries. The prin-

ciple inherent in the question is the legality of putting any substance in public water supplies for the purpose of preventing or curing diseases, as distinguished from rendering water pure and wholesome for human consumption.

It is admitted for the purposes of this litigation that:

1. the fluoride is placed in the water to affect the bodies of those drinking the water in the hope of reducing the incidence of dental caries;

2. dental caries is not a communicable disease;

3. the effects of drinking fluoridated water are incompletely known; but it is known that a pathological condition known as mottled enamel habitually affects the enamel structure of the teeth of some children consuming water containing fluoride in the authorized concentration; and

4. the intended benefits of fluoride may be obtained by those desiring them, through bottled water containing fluoride in prescribed amounts, in tablet form and in many other ways and that *such methods which permit control of dosage for each individual are safer and more reliable than adding fluorides to the public water supply* (Tr. 3-4).

No other case has presented such a factual situation to this court.

The Supreme Court of Indiana held that a complaint alleging those facts stated a cause of action, *Tecter v. Municipal City of LaPorte*, 236 Ind. 146, 139 N.E.(2d) 158. The New Brunswick Supreme Court and the Su-

preme Court of Canada reached the same conclusion, *The Queen v. Fredericton* (1955) 2 D.L.R.(2d) 551; *Municipality of Metropolitan Toronto v. Village of Forest Hill* (1957) 9 D.L.R.(2d) 113.

In his classic work on the Police Power, Freund says in section 143:

> "The questions which present themselves in the examination of a safety or health measure are: does a danger exist? is it of sufficient magnitude? does it concern the public? does the proposed measure tend to remove it? is the restraint requirement in proportion to the danger? *it is* [*sic*] *possible to secure the object sought without impairing essential rights and principles?* does the choice of a particular measure show that some other interest than safety or health was the actual motive of the legislature?" (Emphasis supplied)

The only answers to these questions possible under the pleadings require reversal of the judgment in the instant case.

The refusal of this court to consider this case on its merits leaves unimpaired a six-to-three decision of the Supreme Court of Washington which stands as authority for injecting into public water supplies any substance the legislative authority deems good for people at the moment.

As pointed out in appellant's statement as to jurisdiction, pages 22-23, experiments were conducted as early as 1927 with iodization of public water supplies to prevent goiter. The decision of the Supreme Court of Washington in this case, if not reversed, furnishes

ample precedent for just such experimentation with any substance to treat any condition.

Subjecting people against their will to a mass treatment for non-communicable diseases when individual means of treatment are readily available, economical, safer and more effective would seem to raise a question of deprivation of liberty without due process of law which is at least entitled to consideration on its merits.

Respectfully submitted,

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MARY ELLEN KRUG
FREDRIC C. TAUSEND
Counsel for Appellant.

CERTIFICATE OF COUNSEL

Alfred J. Schweppe, one of counsel for appellant, hereby certify that the above petition for rehearing of this cause is presented in good faith and not for delay.

ALFRED J. SCHWEPPE
Of Counsel for Appellant.